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Boiling Down the Boilerplate

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“That’s just the boilerplate; we can skip over that.”

“They commented on the boilerplate; how annoying.”

“That just seems like standard legal stuff.”

If you have ever drafted, negotiated or even read a legal contract of any kind, you may have had one of these reactions to the text typically found at the back of the contract.

But what exactly is “boilerplate” and what makes a provision in a contract “boilerplate”? Unfortunately, those are separate questions, since, to some degree, “boilerplate” is in the eye of the beholder. But before we answer those two questions, perhaps there are two more interesting “sub-questions” to consider. First, why is a contract provision called “boilerplate” in the first place (instead of “stuff we don’t worry about,” “things we probably knew and understood in Intro to Contracts but have long since forgotten,” or “provisions we roll our eyes over when someone comments on them”)? Perhaps because the word “boilerplate” is simply shorter than those more accurate descriptions? And the second “sub-question”: At what point are they going to stop using quotation marks for seemingly every other word, and are they really going to use “ ” for the rest of this article every time they reference “boilerplate”? On that second, “sub-question,” now seems like a good place to stop.

As for the first sub-question, why the word boilerplate? A great legal answer would be that its origin derives from the Latin word *boilerplatious*, which itself is a combination of the Latin words for pithy and superfluous. OK, maybe not a great answer or legal answer. Fortunately or unfortunately, our interpretation, following extensive Google research, believes the more correct

etymology of boilerplate goes back a little less far – specifically, to the 19th century, when news agencies in the United States would send tangible material to small-town papers. To make it as simple as possible, the text was supplied ready to typeset on squeezed paper molds, from which type could be cast locally. All the printer had to do was slot it into the right place on the page. Also at that time, a boilerplate was a plate of steel used as a template in the construction of steam boilers – the templates were supplied by iron foundries to riveters constructing steam boilers. The belief is that these pre-formed slabs of text reminded editors and printers of the standard-sized metal boilerplates.

With respect to the dismissive or even derogatory use of the term boilerplate, World Wide Words.org surmises that since the syndicated material sent to the small-town papers was often "third-rate filler stuff, or semi-disguised advertising puffs, *boilerplate* quickly came to mean hackneyed or unoriginal writing, a meaning very close to that of *stereotype* itself." Editors at that time started comparing "trite and unoriginal work that ad writers and others sometimes submitted for publication" to boilerplates. Thus, a new meaning of the word boilerplate was born.

The legal industry seemed to take notice of this new usage for the word boilerplate but, as lawyers often do, applied its own spin as early as 1954 in Bedford, Pennsylvania. That year, the *Bedford Gazette* published an article criticizing "boilerplates" because it was fine print in legal contracts designed to alter certain statutory principles that would otherwise govern. Another new meaning emerges – however, we should point out that with respect to the subterfuge, fine print implication expressed by the *Bedford Gazette* (and of course giving all lawyers the benefit of the doubt), we believe that the boilerplate in commercial loan agreements is not a means to hide any deviation from commonly understood statutory principles, and we'll discuss what it does do later in this article. However, the concerns expressed by the *Bedford Gazette*'s derogatory use of boilerplate in legal contracts are not completely unwarranted for a couple of reasons. The first of which is evidenced by the fact that in the United States we have a wide array of both state and federal consumer protection laws, some of which targets "fine print" (*i.e.*, boilerplate) in consumer contracts. The concern is heightened in the consumer context because you have parties signing legal contracts that might not be as sophisticated, likely do not have a lawyer reviewing the contract on their behalf, and likely will not be reading the contract themselves, let alone the "fine print." Second, and beyond the consumer context, the criticisms expressed by the *Bedford Gazette* can be seen in commercial contracts, where parties seek to make certain provisions conspicuous by the use of ALL CAPS.

Taking those interpretations and moving them to our transactional, loan agreement world of today, we think it's fair to say that practicing lawyers and law students alike either misuse the term today (at least as to the hackneyed or trite part) or, more likely, the word has once again made an etymological metamorphosis. So with our history lesson done, what do we, the readers of this article, think of as boilerplate today? What is boilerplate and what makes something boilerplate? As we said earlier, those really are separate questions, since, to some degree, "boilerplate" is in the eye of the beholder.

What do most non-lawyers think of as boilerplate? We don't know, since we are lawyers. But if we had to guess, the answer would be something along the lines of, "something in a legal document that I don't need to worry about or my lawyer is in charge of."

What do most lawyers think of as boilerplate? We don't know either, since we aren't "most" lawyers. However, we can try and answer what these two lawyers think of as boilerplate. The answer to that question also has two sub-questions. At a high level, when we say something is "boilerplate," we are thinking of the provisions typically found at the back of a legal contract. These provisions are contained in all types of legal contracts, ranging from home mortgages, car loans, large asset purchase contracts to residential real estate leases. The second sub-question that we, as lawyers, think of – something that might be missed in the layperson's "I don't need to worry about" response – is the "my lawyer is in charge of" piece. But, why would your lawyer be in charge of it? Because whether or not something is boilerplate, if it's in the agreement, it almost certainly has some substance to it, or it simply wouldn't be in the agreement.

So, in the 21st century, thus far, boilerplate can be described as provisions typically found in legal contracts that are substantive (or they wouldn't be there), and since they are substantive, my lawyer should worry about them. Does that mean that even though they are substantive, since the lawyer is in charge of those provisions, the client doesn't need to worry about them?

The answer to that question is best answered by tackling the last question: What makes certain provisions boilerplate? We think that answer actually ties back to the original use of the word – maybe not the template part, but the standardization piece. This is where the various historical uses and understandings of the word somewhat coalesce. Boilerplate are substantive provisions found in legal contracts that have largely become standardized.

Unfortunately, despite that description, though accurate, it still doesn't tell the full story. The problem is the phrase "largely standardized." Stated differently, boilerplate remains a spectrum concept – meaning that, on one end of the spectrum, there is boilerplate where discussions rarely (if ever) occur, since they have become standardized to the point where the legal focus would be limited to deviations to the norm. Examples might include: notice provisions, expenses, governing law, submission to jurisdiction venue and forum, waiver of jury trial, severability, electronic execution, etc.

On the other end of the boilerplate spectrum are provisions that clients would likely characterize as boilerplate, since they are in the back of the agreement and rarely discussed between lawyer and client. However, lawyers might only go so far as to call them "quasi-boilerplate," since they are still often discussed (the "quasi" part), but the scope of comments, changes, etc. and universe of negotiation are either limited to only certain provisions or concepts within the particular section and/or the common "give and take" positions are largely known. Examples might include: indemnification, assignments and participations, confidentiality provisions and payment of expenses.

For lawyers and non-lawyers alike, the term and concept of "The LSTA" is often discussed in the same context as boilerplate. However, while viewed as boilerplate or quasi-boilerplate by some, we believe it's more accurate to characterize LSTA provisions as outside of the boilerplate spectrum since there has yet to occur the standardization required to constitute boilerplate. So what is LSTA? The LSTA is the Loan Syndications and Trading Association. It was formed in 1995 by the various constituencies to the syndicated loan market to achieve a number of goals – one of which was to improve the efficiency within that market. One of the LSTA's first initiatives was to develop a standardized form of assignment agreement to make

the trading of syndicated loans more efficient. Since then, the LSTA has produced standardized loan documentation that is often referenced as being quasi-boilerplate, meaning that lender clients generally view LSTA drafted provisions as being acceptable to them. However, not all borrowers feel the same about all LSTA provisions. Some LSTA drafted provisions (like assignments) have largely moved into a characterization as essentially boilerplate, while other provisions (like tax) would be best characterized as a very good starting point that will most often greatly limit the scope of the negotiations.

As the above spectrum discussion illustrates, it's important for lawyers and businesspeople alike to know that the concept of boilerplate absolutely depends on the context of the agreement, the parties, course of dealing, etc. As a result, it's inaccurate to have an expectation that these provisions do not change from one transaction to another or that they are just stock or form provisions and that everyone agrees to them. That being said, while the context may shift, in most cases, we think it is safe to let businesspeople off the hook from any reasonable expectation of review and concern – but only if the provisions fall into the boilerplate category for the particular transaction, of course.

For the lawyer crowd, however, not only does the boilerplate list change depending on the context of the transaction and the parties thereto, but also if the measuring stick of what is or is not boilerplate depends on some level of standardization. Until one is well-versed as to what the standard actually is, it's safe to say, there is no such thing as boilerplate for any such lawyer.